

H-2A Handbook

April 2014

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Purpose

The H-2A Handbook provides Washington State Employment Security Department (ESD) staff the information and tools they need to process and service H-2A job orders, conduct proper job referrals and engage in outreach in a standard manner. It will be updated as additional processes become standardized.

This handbook aligns with federal regulations and state laws.

Introduction

What is the H-2A program?

The H-2A temporary agricultural program establishes a means for agricultural employers who anticipate a shortage of domestic workers to bring non-immigrant foreign workers to the U.S. to perform agricultural labor or services of a temporary or seasonal nature.

Before an employer's petition to hire foreign workers can be approved (20 CFR 655.100), the employer must prove to the U.S. Department of Labor (DOL) that:

1. There are not sufficient, able, willing and qualified U.S. workers available at the time and place needed to perform the labor or services defined in the H-2A application; and
2. The employment of H-2A workers will not adversely affect the wages and working conditions of U.S. workers similarly employed.

In order to satisfy these foundational requirements, as part of their application, employers must also agree to abide by the following requirements:

- **Recruitment:** Employers must independently recruit U.S. workers in order to attempt to meet their labor needs prior to the departure of foreign workers to the U.S. Recruitment efforts must include contacting certain former U.S. employees and coordinating recruitment activities through the appropriate state workforce agency.
- **Hiring:** Employers must hire all job seekers who are determined to be able, willing, eligible and qualified, and who apply for work up until half of the work contract has elapsed (50-percent rule).
- **Pay:** Employers must pay the highest of the state prevailing wage, the federal adverse effect wage rate (AEWR), the state minimum wage or the agreed-upon collective bargaining rate. The AEWR is adjusted annually and posted on DOL's foreign-labor certification website (see [Other online resources](#)).
- **Housing:** Employers must provide free licensed housing to all foreign and U.S. workers who cannot reasonably return to their residence within the same day.
- **Meals:** Employers must provide free, convenient cooking facilities or three meals per day with a maximum charge designated by the DOL for all workers (foreign or domestic) who occupy employer-provided housing.

- **Transportation and subsistence:** Employers must reimburse foreign and migrant workers for subsistence (lodging and meal costs) and transportation from the workers' place of residence to the employer's place of business if workers complete at least half of the work contract. Return costs must be paid if the work contract is completed. Employers also must provide free daily transportation to and from the employer-provided housing and the worksite to workers who qualify for housing.
- **Tools and supplies:** Employers must furnish workers with all tools, supplies and necessary protective equipment to do the job, without charge.
- **Worker's compensation insurance:** Employers must provide worker's compensation insurance for all workers in the same manner it is provided for Washington state workers.
- **Three-fourths guarantee:** Employers must guarantee to offer workers a total number of hours equal to at least 75 percent of the work days in the contract period.

How do employers apply for the H-2A program?

The H-2A application process involves multiple state and federal agencies. The following represents a brief overview of steps a prospective H-2A employer must follow:

Step 1: The employer submits a job order (ETA Form 790) to the state workforce agency (SWA), which is the Employment Security Department (ESD) in Washington State, for review and approval between 60 and 75 days before the date work is set to begin.

Step 2: The employer submits an application package, which shall include ETA Form 790, to the U.S. Department of Labor's (DOL) Office of Foreign Labor Certification (OFLC) National Processing Center for review and approval no fewer than 45 days before the date work is set to begin. Steps 1 and 2 are covered in greater detail in DOL's H-2A employer handbook (see [Other online resources](#)).

Step 3: After receiving certification for H-2A employment from DOL, the employer submits Form I-129 to the U.S. Citizenship and Immigration Services (USCIS) department for review and approval. Step 3 is covered in greater detail in the USCIS H-2A web page (see [Other online resources](#)).

Step 4: Lastly, the employer coordinates efforts to ensure prospective workers outside the U.S. apply for a visa and/or admission tied to the employer's H-2A application. After USCIS approves Form I-129, prospective foreign workers must:

- Apply for an H-2A visa with the U.S. Department of State (DOS) at a U.S. Embassy or Consulate abroad, then seek admission to the U.S. with U.S. Customs and Border Protection (CBP) at a U.S. port of entry; or
- Directly seek admission to the U.S. in H-2A classification with CBP at a U.S. port of entry, if a worker does not require a visa.

In addition to the state and federal agencies noted above, other agencies play a major role in the administration and oversight of the H-2A program. Those include:

- The DOL's Wage & Hour Division – enforces labor-standards protections that extend to temporary workers admitted to the U.S. under the H-2A program.
- Washington State Department of Health – certifies temporary farmworker housing in Washington state.
- Washington State Department of Labor & Industries – certifies small temporary farmworker housing units and administers the State Workers Compensation system in Washington state.

The procedural guidance contained in this document centers on those activities that are the responsibility of the Employment Security Department around developing H-2A job orders and recruiting U.S. workers. However, additional information is available through the websites listed in the [Other online resources](#) section.

H-2A Handbook definitions

Agricultural Services Unit (ASU) – Within ESD, this unit is responsible for developing strategies and policy and providing technical assistance for ESD staff engaged in the Migrant Seasonal Farm Worker (MSFW) program, temporary foreign agricultural-labor certification programs (H-2A and H-2B) and other agricultural initiatives.

Corresponding employment – The employment of U.S. workers by an employer who has an approved H-2A *Application for Temporary Employment Certification* in any work included in the job order, or in any agricultural work performed by the foreign H-2A workers. To qualify as corresponding employment, the work must be performed during the validity period of the job order, including any approved extension (20 CFR 103(b)).

Enforcement agency – A body sanctioned by local, state or national government to enforce laws. Examples may include the Washington State Department of Labor & Industries (L&I) and DOL's Wage & Hour Division (WHD).

Field check – A formal, random, unannounced on-site review intended to determine whether an employer is in compliance with terms and conditions of employment as stated in an agricultural-clearance order (20 CFR 653.503). Field checks are conducted by ESD's Agricultural Services Unit (ASU).

Field visit – An informal visit (usually pre-scheduled, but may be unannounced, depending on local relationships) intended to extend services available via WorkSource or other local partners to MSFWs. Field visits usually are conducted by MSFW outreach workers as a regular part of their outreach activities.

Office of Foreign Labor Certification (OFLC) – Serves as the organizational component of the DOL's Employment and Training Administration. Provides national leadership and policy guidance, and develops regulations and procedures to carry out the responsibilities of the secretary of labor under the INA concerning the admission of foreign workers to the U.S. to perform work described in 8 U.S.C. 1101(a)(15)(H)(ii)(a).

Order holding office (OHO) – The local WorkSource center or affiliate office that is designated by the ASU to create and manage an H-2A job order. The ASU bases its designation on whether the service-coverage area of the WorkSource center or affiliate office aligns with the locations of employment listed in an H-2A application.

State workforce agency (SWA) – The state-government agency that receives funds as per the Wagner-Peyser Act (29 U.S.C. 49 et seq.) to administer the state's public labor-exchange system. In Washington state, the Employment Security Department (ESD) is the SWA.

Roles and responsibilities

ESD central office

Agricultural Services Unit (ASU)

The roles and responsibilities of the ASU:

- Review ETA Form 790 (Agricultural Food Processing Clearance Order) and its supporting documentation for compliance. As part of this process, the ASU shall:
 - Adhere to regulatory timelines associated with responding to H-2A employer applications;
 - Coordinate preoccupancy housing inspections of employer-owned housing with the Department of Health (DOH) and the Department of Labor & Industries (L&I) prior to certification from DOL;
 - Maintain files, electronic or otherwise, of all correspondence associated with H-2A applications; and
 - Conduct field checks (see next page) on a minimum of 25 percent of H-2A job orders with at least one WorkSource job placement.
- Support local staff, partners and the agricultural industry by:
 - Assisting with preparing presentations, reports, issue papers for internal and external audiences who are interested in agricultural programs and services;
 - Responding to technical-assistance requests made by partners, employers, farmworker organizations and job seekers;
 - Facilitating statewide Workforce & Career Development Division (WCDD) agricultural-services conference calls;
 - Maintaining a list of open H-2A job orders on the Farmworker Services website (see [Other online resources](#));
 - Maintaining up-to-date H-2A activity spreadsheets to track the status of H-2A applications, including referral and hire activity, from receipt to closure;
 - Ensuring that OHO staff have the information they need regarding when to change the status of H-2A job orders, i.e., opening for intrastate recruitment, opening for interstate recruitment, putting the job order on hold, closing the job order, etc; and
 - Keeping the H-2A Handbook up-to-date and notifying ESD staff of any changes.

- Communicate with the Office of Foreign Labor Certification (OFLC) by:
 - Participating in DOL monthly SWA teleconferences in order to communicate updates to field operations, as needed;
 - Filing quarterly foreign-labor certification activity reports; and
 - Responding to program planning requests made by OFLC in order to request funds that help ESD carry out its foreign-labor certification program (H-2A and H-2B) responsibilities.

H-2A field checks

The Agricultural Clearance Order Activity regulations at 20 CFR 653 Subpart F require ESD to “conduct random, unannounced field checks at a *significant* number of agricultural worksites to which employment-service placements have been made through the intrastate or interstate clearance system.” ESD must conduct field checks on worksites when workers are present, and must review wages, hours, housing conditions and working conditions as stated in job orders. The Labor Exchange Agricultural Recruitment System (LEARS) clarifies that a *significant* number is determined to be, at a minimum, 25 percent of all agricultural-clearance orders in which at least one domestic worker has been placed.

The ASU is responsible for conducting field checks in order to: (1) determine whether employers participating in the agricultural intrastate and interstate clearance system (via H-2A) have complied with contract terms related to wages and hours; and (2) satisfy DOL field-check requirements. Field checks must include worker interviews. While ESD field checks will focus on reviewing wages and hours, ESD may identify and address other compliance issues at the time of review. ESD will not focus primarily on housing and working conditions because L&I conducts random, unannounced field checks on agricultural employers to determine compliance with housing, health and safety laws.

Labor Market & Performance Analysis (LMPA)

The DOL requires participating H-2A employers to pay workers “the highest of the adverse effect wage rate (AEWR), the prevailing hourly wage or piece rate, the agreed-upon collective bargaining wage or the federal or state minimum wage, except where a special procedure is approved for an occupation or specific class of agricultural employment.” H-2A employers must also list job qualifications and requirements that are “bona fide and consistent with the normal and accepted qualifications required by employers that do not use H-2A workers.”

ESD’s LMPA unit surveys non-H-2A agricultural employers as per instructions provided in the ETA 385 Handbook, in order to gather information that helps DOL set minimum prevailing piece rates and establish common employer practices for employers that apply to the H-2A program in Washington state. The survey is called the Fruit Growers Wage Survey. Presently, the Fruit Growers Wage Survey is updated every two years.

Washington state prevailing wage rates endorsed by the DOL are available on DOL’s Agricultural Online Wage Library. Find links to the ETA 385 Handbook, the Fruit Growers Wage Survey and the Agricultural Online Wage Library in the [Other online resources](#) section.

Administrators

ESD administrators are responsible for implementing the H-2A program at the local level. The following sections describe minimum expectations of administrators who manage an office designated as an H-2A order-holding office (OHO) by the ASU and administrators who manage offices that refer a significant number of job seekers to H-2A job orders (non-order holding offices, or non-OHO).

Note: Administrators may establish systems or delegate responsibilities to other supervisors/staff in order to satisfy minimum requirements noted in this section.

Order holding office (OHO)

Administrators of an office that has been assigned an H-2A job order by the ASU are responsible for:

- Designating a staff person to create and manage an H-2A job order when notified by the ASU.
- Requiring designated staff to follow standards noted in the H-2A Handbook, including [job-order development standards](#), [H-2A referral standards](#) and [recruitment requirements](#).
- Ensuring contact (preferably in person) is made with local employers applying for H-2A prior to the filing of an ETA 790 or shortly after, in order to:
 - Establish or maintain communication needed during the recruitment process to verify H-2A referral outcomes;
 - Review successes or challenges associated with the employer's previous H-2A application, if applicable;
 - Respond to questions relating to H-2A program requirements; and
 - Offer other WorkSource services that may be of interest.
- Requiring designated staff to participate on state agricultural services conference calls.
- Establishing a process for reviewing the quality of H-2A job orders and H-2A job-order referrals as per H-2A Handbook standards.

Non-order holding office

Administrators of non-OHO offices that refer job seekers to H-2A job orders must, at a minimum:

- Ensure staff making referrals to H-2A job orders are aware of and follow all applicable H-2A requirements, mainly:
 - [H-2A referral standards](#);
 - [Recruitment requirements](#), which include stopping positive recruitment three days before the date work is set to begin; and
 - [Required tools](#) (i.e., side-by-side, worker rights trifold, etc.) available via SharePoint (see ag services [SharePoint guide](#)).
- Ensure active participation in state agricultural services conference calls if there is significant local referral activity to H-2A job orders.
- Coordinate follow-up on referrals with the OHO in order to avoid duplication of efforts and multiple job-seeker or employer contacts.

Staff assigned to H-2A job orders

OHO staff assigned to manage H-2A job orders must:

- Review and comment on all H-2A applications within their local jurisdiction when notified by the ASU, in order to ensure compliance with H-2A regulations and local prevailing practices. At a minimum, local staff must focus on reviewing:
 - Location of the employment site and housing (item 3);
 - Referral instructions and hiring information (item 15); and
 - Job requirements (item 16).
- Create a job order with special instructions using standard language in the H-2A job-order templates (see [H-2A job order SKIES entry template](#) and [H-2A job order example](#)).
- Follow instructions provided by central office for updating the status (open, hold, close) of H-2A job orders.
- If located in an MSFW-significant office, create a [side-by-side English/Spanish document](#) using the standard template available in SharePoint (see [SharePoint guide](#)). Non-MSFW-significant office staff may request assistance from the ASU in creating the standard side-by-side.
- Serve as the local point of contact for activities or questions about the designated H-2A job order.
- Inform the OHO staff that [positive recruitment](#) has ended three days prior to the date the employer needs the worker (date of need).
- Ensure that H-2A job orders have a close date that will automatically close the order once 50 percent of the work period has been completed (use [50 percent calculator](#)).
- Follow up weekly on job referrals made to employers during the positive recruitment period, and as needed after the date of need, in order to document hiring outcomes.

MSFW outreach specialists

MSFW outreach specialists shall promote H-2A job opportunities as part of their normal outreach activities during the [positive recruitment](#) period. Efforts must include:

- Announcing H-2A jobs through the local radio station(s);
- Posting fliers throughout the community where agriculture workers congregate, including workers' living/housing areas;
- Posting fliers in the WorkSource office resource room;
- Informing community partners/organizations of opportunities; and
- Informing job seekers of H-2A job opportunities.

MSFW outreach specialists also are expected to make field visits to H-2A work and/or housing sites in their service delivery area after foreign workers have arrived. MSFW outreach specialists must talk with farmworkers and employers in order to observe terms and conditions of employment specified in the H-2A Clearance Order, to answer questions from workers and employers, and to offer WorkSource services.

During field visits, MSFW outreach specialists must, at a minimum, offer the following materials to H-2A foreign workers and workers in corresponding employment:

- The [H-2A workers' rights tri-fold](#); and
- A business card with outreach staff contact information.

Note: MSFW outreach specialists are advised to review the ETA 790 and carry a copy during field visits in case questions come up.

MSFW outreach specialists or any other ESD staff must attempt to make arrangements with employers prior to field visits, although impromptu visits may occur in the course of normal outreach activities, depending on relationships established with employers. Staff must check in with employers before entering the field or other worksites, as well as respect food safety rules and other relevant laws, in order to maintain good working relationships. If employers deny access, staff should report this to their supervisor and the ASU.

H-2A application review process

ESD (SWA) review process (60-75 days)

To be approved for a temporary labor certification from OFLC, H-2A employers must first submit an Agricultural and Food Processing Clearance Order ETA 790 and attachments with the Washington State Employment Security Department's (ESD) Agriculture Service Unit (ASU). Employers must submit documents between 60-75 days before they need workers to start.

Once ASU receives the ETA 790 and supporting documentation from employers, the ASU must:

- Forward a copy of the ETA 790 and its attachments via email to the WorkSource office located in the area of intended employment (the OHO). The notice will instruct the OHO to review and comment within two business days. The ASU also will instruct the OHO to create an AG2 Type job order by using the [H-2A job order SKIES entry template](#) and a [side-by-side English/Spanish document](#). The job order will remain in "hold" status until the ASU has accepted the ETA 790 for processing.
 - If an application contains multiple worksites, the ASU must send the application to the office with the most worksites in its service area. The ASU will send notification and copies of the ETA 790 to the other offices that have worksites listed on the application.
- Review the ETA 790 and its attachments for compliance with federal regulations and state law using the [ETA 790 review checklist](#). The ASU must consider feedback provided by the OHO prior to issuing a response to an employer. The response is due seven calendar days after the ASU receives the application.
 - If approved, the ASU must issue a "Notice of Acceptance" to the employer. The ASU must immediately instruct the OHO to open the AG2 H-2A job order and to engage in positive recruitment.
 - If found to be non-compliant, the ASU must issue a "Notice of Deficiency" to the employer, which gives the employer the opportunity to correct compliance issues within five calendar days. During that time, the OHO must leave the job order in "hold" status.

- If the employer corrects deficiencies within five calendar days, the ASU must issue a "Notice of Acceptance" no later than three calendar days after receiving the employer response. The ASU must immediately notify the OHO and instruct the OHO to open the H-2A job order and immediately engage in [positive recruitment](#). The ASU will send a copy of the "Notice of Acceptance" to the OHO, so that any relevant changes can be made to the job order based on deficiencies corrected by the employer.
- If the employer has not corrected deficiencies within five calendar days, the ASU must issue a "Notice of Denial." The notice and related attachments must be forwarded to the Chicago National Processing Center for further consideration.

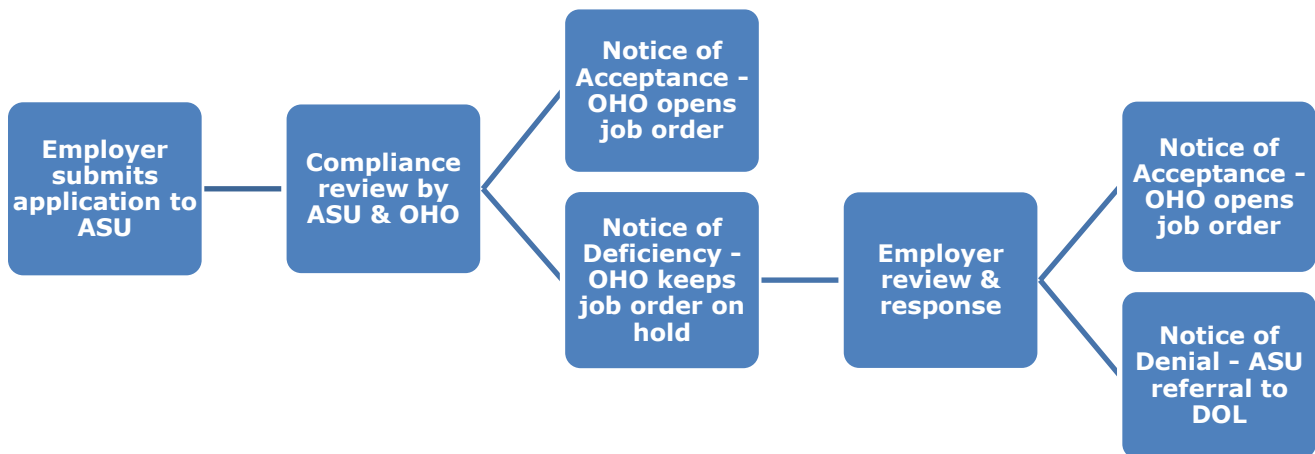


Figure 1: ESD ETA 790 review process

DOL review process (~30-45 days)

After ESD's review, employers are required to submit application materials to DOL's Chicago National Processing Center (CNPC) no later than 45 days before the date they need the workers (date of need). Employers must submit a packet that includes documents reviewed by ESD.

Similar to ESD's review process, DOL's review process, which takes place about 30-45 days before work is set to begin, may consist of the following:

- "Notice of Deficiency";
- "Notice of Denial";
- "Notice of Acceptance"; and
- "Notice of Certification".

The CNPC issues a "Notice of Deficiency" if it determines the application packet is not compliant or information is missing. If employers don't resolve the noted deficiencies within three days, CNPC may deny the application and send a "Notice of Denial." If CNPC issues a "Notice of Denial", the ASU will instruct the OHO to place a job order on hold or close the job order. If DOL accepts the application for processing, DOL will send a "Notice of Acceptance" to the ASU. The ASU will immediately forward the acceptance letter via email to the OHO along with instructions for assigned staff to modify the job order in SKIES from an AG2 type (intrastate recruitment) to an AG4 type (interstate recruitment).

Note: When the DOL accepts an employer's H-2A application for processing, the ASU must send a copy of the application to the states of Oregon, Idaho and California as a part of the interstate clearance process.

Finally, once the application is approved and the ASU has confirmed that housing has been inspected, CNPC will issue a "Notice of Certification." The ASU must issue the certification letter to assigned staff at the OHO.

Staff should refer employers who are interested in learning more about the H-2A application process from DOL's perspective to review DOL's H-2A employer handbook (see [Other online resources](#)).

Development of H-2A job-orders

Standards for developing H-2A job orders

The H-2A program has unique requirements not common in most job orders. To ensure the WorkSource system provides consistent, high quality job-order and referral services to effectively match job seekers and employers, assigned staff from OHOs must:

- Create an H-2A job order by using the [H-2A job order SKIES entry template](#), which should result in the posting of a job order that looks like the [H-2A job order example](#).
- Create a side-by-side English/Spanish document using the standard [side-by-side template](#). The newly created side-by-side must be immediately posted in SharePoint when complete (see [SharePoint guide](#)).
- Follow all instructions provided by the ASU via email and modify the job order accordingly.

Staff designated to develop and manage H-2A job orders are should use the reference tools provided in [WIN 0032](#).

Special requirements/procedures for H-2A job orders

H-2A regulations at 20 CFR 655.102 allow employers to adopt special procedures for open-range production of livestock, itinerant animal shearing, itinerant commercial beekeeping, multi-state custom combine owners/operators, shepherding and goat-herding occupations. These special procedures may differ when compared to experience, wage rates, hours, recruitment requirements and work-contract periods that would otherwise not be allowable under 20 CFR 655 Subpart B.

Special procedures are defined in Training Employment Guidance Letters (TEGLs) available on DOL's Foreign Labor Certification Policies and Regulations website (see [Other online resources](#)). For more information, check the website or contact the ASU.

Job orders filed by H-2A employers after the 50-percent period

H-2A employers are no longer required to hire qualified U.S. workers after 50 percent of the period of work has elapsed. While most H-2A employers conclude their recruitment efforts at this time, special circumstances, such as an unanticipated labor need, may lead an H-2A employer to request additional assistance from WorkSource.

If an H-2A employer requests that WorkSource initiate recruitment efforts through a staff-assisted job order after 50 percent of the period of work has elapsed *and* the positions being requested qualify as corresponding employment (see [definitions](#) or 20 CFR 655.103(b)) a new staff-assisted (i.e., WA) job order must be created. The new job order must be nearly identical to the H-2A job order previously filed by the employer. It should reflect the pay, benefits, working conditions and applicable guarantees afforded to workers in corresponding employment. However, some changes may be applied to this new job order depending on the level of recruitment being requested by the H-2A employer (local recruitment or agricultural clearance system).

For more information, please contact the ASU.

H-2A referral standards

Referral process

Staff referring job seekers to an H-2A job order must follow these steps to ensure job seekers meet the minimum job qualifications and to ensure job seekers are informed of terms and conditions of employment, benefits, assurances, expectations and their rights under the H-2A program (20 CFR 655.155).

1. Review the job-order content with the job seeker.
2. Review the job seeker's qualifications and verify that he or she meets job-order requirements.

Note: It is crucial that staff confirm job seekers meet all job requirements, including anticipating being available for work the entire contract period. Job seekers who do not meet all minimum requirements must not be referred.

3. If qualified, enter the job seeker as a referral in the SKIES job order, and review the following materials with the job seeker.
 - A copy of the job order *or* a copy of standard H-2A job order English/Spanish side-by-side (for monolingual Spanish speakers) available in SharePoint. WorkSource offices may create checklists in other languages in order to serve a specific local demographic. However, the checklist must follow the standard [side-by-side English/Spanish template](#).
 - A copy of the [H-2A worker rights trifold](#), which informs individuals of their basic rights in connection with H-2A job orders.
 - A WorkSource referral form for job seekers who plan to apply for work in person (see step 4).
 - If available, a brochure developed by either L&I or DOL's Wage & Hour Division that helps workers track hours worked and wages earned.

Note: ESD staff should never use the "Reserved Referral" option in SKIES for an H-2A job order.

4. Provide all necessary information to the job seeker to identify the employer involved and to determine his/her preferred method of contact. Job seekers living within the local area should be encouraged to apply for H-2A positions in person, if it costs little or nothing. However, staff also must give job seekers the option to request a phone interview.
 - Staff must give the "WorkSource Referral Form" to job seekers who choose to apply **in person**. The referral form serves as a tool that communicates to employers that the job seeker has been determined to meet minimum job requirements by WorkSource. Meanwhile, the form allows for workers to document interview outcomes. Referring staff must fill out this form, except for the results section. Staff must inform job seekers to hand the form to the employer at the time of interview, so that the outcome can be documented.
 - If job seekers choose to apply **by phone**, ESD staff may help by allowing job seekers to use a staff member's office phone to attempt a phone interview. If the job seeker does not reach the employer, staff shall ensure the job seeker leaves a phone message using the script provided in the special instructions of the job-order template. Staff must document the attempt in the job-order notes.
5. Ask the job seeker to follow-up with the referring office to communicate the outcome of the referral.

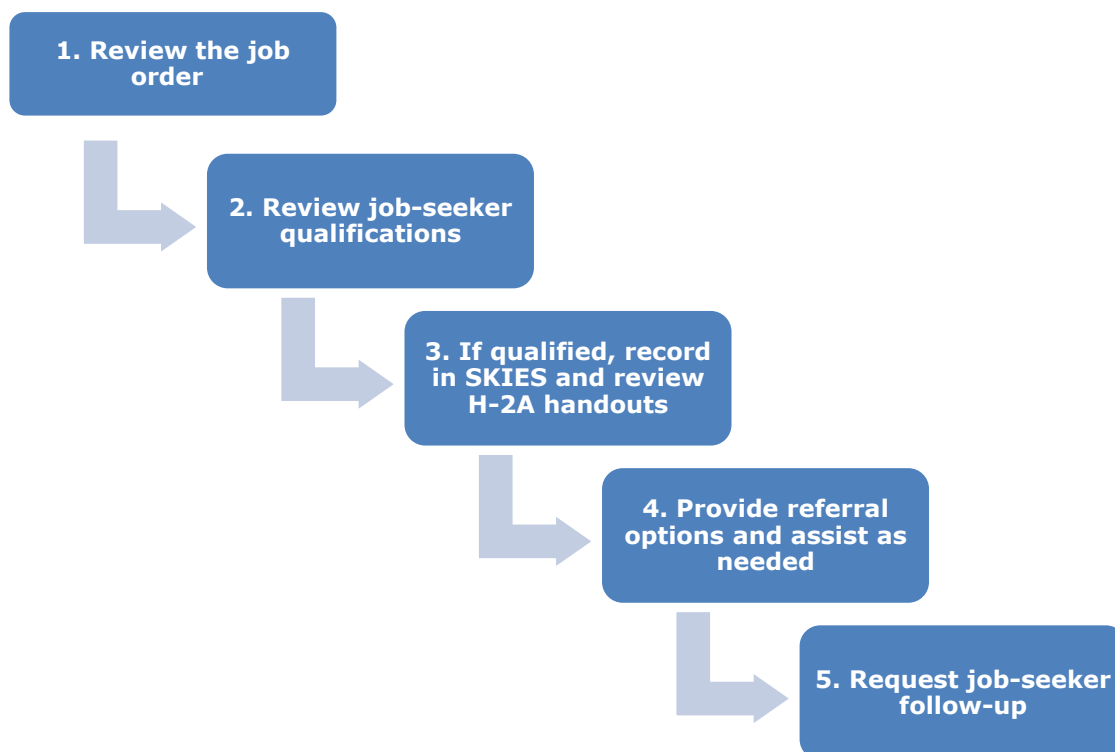


Figure 2: H-2A referral process

Out-of-state referral requests on H-2A job orders

Inquiries from customers who live outside the state are common in the H-2A program, due to the requirement for approved applications placed in interstate recruitment (AG4) to be cleared to traditional labor-supply states and posted on DOL's iCert website (see [Other online resources](#)).

If a job seeker requests a referral by phone for a H-2A job order, staff shall assist the job seeker. Staff must follow [H-2A referral standards](#), while also creating or updating the job seeker's registration in SKIES. When possible, provide via email or fax materials such as the H-2A job order or the standard side-by-side English/Spanish document and the [H-2A worker rights trifold](#).

If referred job seekers cannot reasonably return to their residence within the work day, ESD staff must tell them to contact the local OHO between 5-9 days prior to the contract start date in order to confirm that the contract start date has not changed. OHO staff contact information must be provided. OHO staff must document contact made by migrant job seekers 5-9 days prior to the contract start date in SKIES.

Confirming referral outcomes

Assigned OHO staff is responsible for following up on referral outcomes. During the positive recruitment period, assigned OHO staff must follow up weekly on job-order referrals. Follow up may include engaging with job seekers, employers or those acting on behalf of employers.

Note: Non-OHO staff who are following up on referrals to H-2A job orders must coordinate with assigned OHO staff prior to contacting employers or those acting on behalf of employers.

Referral outcomes shall be reported in the following manner:

- If a job seeker is reported as not hired, assigned OHO staff must document the outcome in SKIES and confirm the reason was lawful and job-related. If OHO staff believe a job seeker was turned away for an unlawful reason or a reason not job-related, they must follow local procedures for handling apparent violations, as noted in the [H-2A concern & complaint procedures](#) section.

- If a job seeker is reported as hired before the date work begins, OHO staff must immediately document the outcome as a "hire" in SKIES. Assigned OHO staff must update the "hire" status in SKIES after the date work begins in order to confirm that a reported hire actually showed up for work. If a hired job seeker does not show up for work, the "hire" must be updated to "hired did not report."

Recruitment requirements

H-2A employers and SWAs must conduct a labor-market test 30-60 days before workers depart for the U.S. from a foreign country. Once foreign workers arrive, H-2A employers and ESD must further ensure that the employment of H-2A workers will not adversely affect the working conditions of similarly employed U.S. workers. The following sections describe steps ESD staff must take to promote H-2A job openings.

Positive recruitment

H-2A employers must engage in positive recruitment, which is defined as the active participation of an employer in recruiting and interviewing individuals in the areas where the employer's job opportunities are located, and in states designated by CNPC, in order to fill specific job openings with U.S. workers. Like employers, ESD staff also must engage in positive recruitment, starting on the date ESD's central office approves the ETA 790 (H-2A job order) and concluding three days before the date work begins (20 CFR 655.158).

ESD's positive-recruitment efforts also may include announcing H-2A job opportunities through the methods noted below, which go beyond the standard practice of creating a job order in SKIES and posting it on go2worksource.com.

- Broadcasting on local radio station(s);
- Posting fliers throughout the community where agriculture workers congregate, including workers' living/housing areas;
- Posting fliers in the WorkSource office (OHO) resource room;
- Informing community partners/organizations of opportunities; and
- Informing job seekers of H-2A job opportunities.

50-percent rule

Once the positive recruitment period has passed, ESD staff must halt all recruitment efforts that extend beyond the management of an H-2A job order (broadcasting on local radio, posting fliers, etc.). While ESD staff can no longer initiate interest in H-2A job orders, ESD must maintain an open job order on go2worksource.com and refer interested qualified job seekers to H-2A employers until 50 percent of the work contract has expired (20 CFR 655.150). OHO staff must use the [50-percent calculator](#) tool to calculate the exact date the job order must close.

After positive recruitment has ended, ESD staff also may advise job seekers to consider other local non-H-2A job openings or H-2A job openings that are within the positive-recruitment period.

Note: H-2A employers are not required to promote H-2A job openings once the positive recruitment period has ended; however, they still are required to cooperate with ESD by accepting all qualified U.S. workers who apply until 50 percent of the period of employment expires (20 CFR 655.135(d)).

Handling inquiries

Stakeholder inquiries on the H-2A program

While ESD strives to collaborate with partners, it is important for staff to follow certain protocols when dealing with requests from enforcement agencies, legislators or other interested parties.

ESD staff may respond to questions from stakeholders when they know the answer and the answer is factual and straightforward. If the answer is complicated or you don't know, say you don't know and explain that you will forward the question to your supervisor or the ASU, who will provide a response as soon as possible. If someone requests a formal interview, a meeting should be scheduled at a future date in order to gather necessary and accurate information and to call the ASU or communications office, if necessary.

Foreign-country inquiries on H-2A job orders

If an individual located in a foreign country contacts ESD staff by phone or email to request help getting an H-2A visa or employment in the U.S. through the H-2A program, staff must respond by stating:

Thank you for your interest in H-2A opportunities in Washington state. Unfortunately, we are required to recruit domestic workers from within the United States. If you are interested in foreign-work opportunities, please consider contacting your local or national employment-services agency.

Sincerely,

If an individual from a Spanish-speaking country makes an inquiry, ESD staff must respond by stating:

Gracias por su interés en oportunidades de trabajo bajo el programa H-2A en el estado de Washington. Desafortunadamente, estamos limitados al reclutamiento de trabajadores domésticos dentro de los Estados Unidos. Si está interesado en obtener información sobre oportunidades de trabajo en el extranjero, por favor, considere contactar su agencia de servicios de empleo local o nacional.

Atentamente,

Statewide agriculture conference calls

OHOs and Non-OHOs that have significant H-2A referral activity must participate in statewide agricultural conference calls. These calls are intended to be a two-way conversation between ESD field staff and the ASU.

ESD field staff, at a minimum, must:

- Be prepared to participate;
- Ask questions;
- Submit agenda topics prior to conference calls; and
- Offer ideas on how to improve service delivery to customers.

The ag conference calls occur every two weeks during peak harvest months (May – November) and monthly during non-peak months (December – April).

H-2A concern and complaint procedures

According to [WorkSource System Customer Concern and Complaint Resolution Policy 1012 Revision 1](#), all H-2A customer concerns must be immediately processed and resolved at the local level whenever possible.

If a customer chooses to file an H-2A complaint, WorkSource partners must follow their local procedures for handling complaints and apparent violations. At a minimum, local procedures must meet requirements provided in section 1 (Wagner-Peyser Complaint Procedures) of the [WorkSource Complaint Handbook](#). Section 1.10 of the WorkSource Complaint Handbook requires all H-2A complaints and apparent violations to be processed as employment-service (ES) complaints.

Per the WorkSource Complaint Handbook:

- All H-2A- and H-2B-related complaints are considered ES-related complaints.
- If a complainant alleges that ESD or its personnel, through actions or omissions, violated H-2A and H-2B regulations, the complaint must be processed as an ES-related complaint against the agency.
- If a complainant files a complaint against an H-2A or H-2B employer, alleging the employer did not comply with recruitment requirements or contractual terms, the complaint shall be processed as an ES-related complaint against the employer.

An ES-related complaint made against an employer, alleging the employer did not comply with recruitment requirements or contractual terms, is related to employment law and must immediately be referred to the appropriate enforcement agency (20 CFR 658.416(b)(1)), in addition to any action taken by ESD.

ESD staff must contact the ASU prior to making any referrals to an enforcement agency.

Labor disputes

Per regulations at 20 CFR 652.9, the SWA must not make a referral to a job order when there is a labor dispute *and* one of the three conditions exists:

1. The job opening is vacant because the former occupant is on strike;
2. The job opening is vacant because the former occupant is being locked out in the course of a labor dispute; *or*
3. The filling of the job opening is an issue in a labor dispute involving a work stoppage.

ESD staff must contact the ASU when alerted to a potential labor dispute. ESD staff must verify the type of labor dispute by contacting parties representing employees and the employer, collecting information and determining the significance of the labor dispute with respect to each opening involved in the job order.

If it is determined that there is a labor dispute and one of the three aforementioned conditions exists, ESD staff will:

- Notify affected WorkSource partners, the DOL regional office and the OFLC about the labor dispute.
- Not accept H-2A job order applications, unless otherwise notified by DOL.
- Place an open H-2A job order on “hold” status until ESD has confirmed the labor dispute has ended or unless otherwise notified by DOL.

ESD staff must remain impartial in dealing with agricultural employers, employees and the employers' and employees' representatives engaged in a labor dispute.

For more information concerning H-2A-related labor disputes, please see DOL's response to [frequently asked questions](#) published on Sept. 15, 2010 (pages 5-6) along with requirements in 20 CFR 652.9 and 20 CFR 655.135(b).

Resources

Required tools

- [50-percent calculator](#)
- [ETA 790 Review Checklist](#)
- [H-2A Job Order SKIES Entry Template](#)
- [H-2A job-order example](#)
- [SharePoint guide](#)
- [Side-by-side English/Spanish template](#)
- [Workers' rights trifold](#)
- [WorkSource Referral Form](#)

Other online resources

- [Adverse Effect Wage Rates](#)
- [Agricultural Online Wage Library](#)
- [DOL Agricultural Recruitment System \(ARS\)](#)
- [DOL ETA 385 Handbook - Wage-Finding Process](#)
- [DOL H-2A Employer Handbook](#)
- [DOL H-2A Temporary Agricultural Program web page](#)
- [DOL Wage & Hour Division web page](#)
- [Foreign-labor certification policies and regulations \(see H-2A TEGLs\)](#)
- [ESD Fruit Growers Survey](#)
- [H-2A Jobs in Washington state](#)
- [iCERT-DOL posting of certified H-2A applications](#)
- [IRS guidance on withholding tax requirements for H-2A workers](#)
- [USCIS H-2A Temporary Agricultural Workers web page](#)
- [WorkSource Washington farmworker & employer services](#)

References

- [Immigration and Nationality Act \(INA\)](#)
- [20 CFR 653 Subpart F – Agricultural Clearance Order Activity](#)
- [20 CFR 655 Subpart B – Labor Certification Process For Temporary Agricultural Employment in the United States \(H-2A Workers\)](#)
- [WorkSource System Coordinated Business Services Policy 1014 Rev. 1](#)
- [WorkSource Information Notice \(WIN\) 0032 Attachment A – Job Order and Referral Requirements](#)
- [WorkSource System Customer Concern and Complaint Resolution Policy 1012 Rev. 1](#)
- [WorkSource Complaint Handbook – Attachment A](#)